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**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/29UM/LDC/2013/0065

Property : 301 High Street
Sheerness
Kent
ME12 1UT

Applicant : Influential Consultants Limited

Representative : Mr. J.F. Thompson and
Mrs. D.P. Thompson

Respondents : Mrs. C.M. Willens
Featurekey Properties Limited
Mr. J.F. Thompson
Mrs. D.P. Thompson

Representative :

Type of Application : Dispensation from consultation:
Section 20ZA Landlord and Tenant
Act 1985

Tribunal Members : Judge R. Norman (Chairman)
Mrs. E. Flint DMS FRICS

**Date and venue of
Hearing** : 9th January 2014
Chatham, Kent

Date of Decision : 15th January 2014

DECISION

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Decision

1. A dispensation from the consultation provisions of Section 20 of the Landlord and Tenant Act 1985 ("the 1985 Act") is not granted in respect of the proposed works to the garden walls and gates at 301 High Street, Sheerness, Kent ME12 1UT ("the subject property").

Background

2. The subject property comprises three self contained flats. The freehold is held by Influential Consultants Limited ("the Applicant"). Mrs. C.M. Willens holds a lease of the top flat 301B, Featurekey Properties Limited holds a lease of Flat 301A and Mr. J.F Thompson and Mrs. D.P. Thompson hold a lease of Flat 301C.

3. The Applicant proposes to carry out works to the garden walls and gates at the subject property and has applied for a dispensation from the consultation provisions of Section 20 of the 1985 Act.

Inspection

4. On 9th January 2014, in the presence of Mr. J.F. Thompson, Mrs. D.P. Thompson and Mrs. C.M. Willens, the Tribunal inspected the garden walls and gates at the subject property which is at the junction of High Street and Maple Street, Sheerness.

5. At the rear of the subject property is a garden. The north western boundary of the garden abuts Maple Street and the south western boundary abuts a pathway. The north western boundary of the garden runs from the flank wall of the subject property where there is a wooden pedestrian gate about six feet high, then a brick wall about seven yards in length and about six feet high and a vehicle gateway. The south western boundary wall is also about six feet high and runs from that gateway for about seven yards.

6. Mr. Thompson pointed out that the wall on the north western boundary did not have any brick piers to support it and that the wall on the south western boundary had only one brick pier and that pier was only about half the height of the wall. By pushing each wall he demonstrated that there was movement in them. There were some loose bricks in the top of the north western boundary wall.

7. There was a pair of wooden gates about six feet high which were leaning against the south western boundary wall and we were told by Mr. Thompson and Mrs. Willens that in the past those gates had been in place across the vehicle gateway.

8. Along the pathway running at the rear of the subject property and other properties in High Street there was an example of timber fencing panels, which those present described as interwoven timber fencing, supported on

slotted concrete posts. Those present agreed that that was the type of fencing being proposed.

Hearing

9. The hearing was attended by Mr. J.F. Thompson, Mrs. D.P. Thompson and Mrs. C.M. Willens,

10. Mr. Thompson confirmed that he and Mrs. Thompson were there on their own behalf and representing the Applicant and Featurekey Properties Limited and that he and Mrs. Thompson were the only directors of the Applicant and Featurekey Properties Limited and therefore had control of those companies. As would be expected there was no objection to the application from Mr. and Mrs. Thompson or Featurekey Properties Limited.

11. Mr. Thompson considered that the Applicant had carried out the consultation procedure required by Section 20 of the 1985 Act but an application for dispensation had been made in case that was not correct and also because he considered that the works were urgently required because the garden walls were dangerous and could collapse on persons using the footway at the side of Maple Street and the pathway beyond the rear of the garden.

12. The Tribunal made it clear and those present accepted that:

(a) Although there were other applications in progress relating to the subject property, it was only the application under Section 20ZA of the 1985 Act for a dispensation in respect of the proposed works to the garden walls and gates which concerned the Tribunal at this hearing.

(b) If the Tribunal granted a dispensation it would mean only that Mrs. Willens could not later claim that the Section 20 consultation procedure had not been properly carried out and that as a result she was liable to pay only £250 towards the works. It would not prevent her making a claim under Section 27A of the 1985 Act that the expenditure had not been reasonably incurred or that the work had not been carried out to a reasonable standard.

(c) The Tribunal's decision to grant or refuse a dispensation would not indicate that the Tribunal considered the walls to be safe or dangerous or, if dangerous, the degree of danger they posed. Neither would the Tribunal's decision affect the position as to the liability of the Applicant or anyone else, either under the terms of the leases or by statute or in any other way to maintain, repair or make safe the garden walls and gates.

13. Before the hearing, representations had been received from the Applicant and from Mrs. Willens and these had been considered by the Tribunal.

14. Mr. Thompson produced for the Tribunal and Mrs. Willens, copies of the responses to consultation from Mr. and Mrs. Thompson and Featurekey Properties Limited which had previously been misfiled.

15. Mrs. Willens had made a number of objections to the way in which the consultation procedure had been carried out and objected to the granting of a dispensation.

16. In December 2012 it was thought that a car had collided with the vehicle gates. Mr. Thompson tried to make an insurance claim and in March 2013 obtained an estimate from a contractor Commercial Electrical Services Ltd. for the removal and rebuilding of the garden walls at a cost of £5,400. There is also an estimate for the same work from Collimores Building Services at a cost of £5,251.87 but from the copy provided by the Applicant it is not possible to read the date. The insurers did not accept the claim and the first notice under the Section 20 consultation procedure dated 21st May 2013 was served along with a letter of the same date.

17. In the notice it was stated that the works to be carried out were:

“a. Demolition & removal of arising’s [sic] of the defective rear garden wall & gates of the Building
b. Replacement of rear garden walls & gates of the Building as necessary & in the light of the contents of our letter dated 21/05/13 attached.”

18. The letter dated 21st May 2013 included that:

(a) Estimates had been obtained for the work required to reinstate the walls and that the cost would be approximately £5,000.

(b) To make cost savings the Applicant was considering reducing the replacement wall height or replacement of the walls by fencing.

(c) It was the Applicant’s considered opinion that the best way forward was for the defective walling to be removed as soon as possible and to be replaced by approximately 4 foot high brickwork to modern constructional standards, that the single gate be removed and replaced by walling and that the double gateway be retained with suitably reduced height gates. That this would minimise costs and reduce maintenance but Mrs. Willens was asked for her input.

19. Mrs. Willens considered that the first notice did not contain a statement as to the proposed works and that the covering letter did not make clear exactly what was going to happen.

20. Mrs. Willens responded to the first notice within the time allowed but there was then a delay of four months before the second notice dated 25th September 2013 was served.

21. Enclosed with the second notice were copies of the two estimates referred to above for removal of the walls and replacement in single skin brickwork with full height piers and copies of the following estimates:

(a) From Hardings “For the removal and disposal of garden gate and walls and the fitting of new fence panels with posts and gravel boards at 301 High street sheerness.” at a cost of £3,400.

(b) From Commercial Electrical Services Ltd. “To carry out works at 301 High Street, Sheerness as follows:- Remove existing rear garden walls, gates and dispose of. Set concrete posts in ground. Fit concrete gravel boards and fence panels.” at a cost of £3,096.

22. In that second notice it was stated that it was proposed that the contractor providing the lower estimate for the replacement of the brick walls with concrete fencing be instructed as soon as practical.

23. In the application for dispensation it is stated that in the second notice dated 25th September 2013 the specification of replacement fencing was incorrect and that this was picked up during pre-instruction site meetings with contractors. As a result, a letter described as a further supplementary consultation dated 24th October 2013 was served. In that document it was explained that the estimate from Commercial Electrical Services Ltd. related to the demolition and removal of the existing unsound walling with subsequent replacement by a timber interwoven panel fencing supported by concrete posts with concrete gravel boards. It was also stated that that proposal was directly comparable to the greater cost estimate provided by Harding and that it was the Applicant's intention to accept the estimate from Commercial Electrical Services Ltd.

24. Mrs. Willens' evidence was that there were no estimates for timber interwoven fencing and that the use of such fencing only came out in discussion between Mr. Thompson and the contractor. The position was still not clear. Written observations had been requested and she had responded within the time allowed. The application for dispensation was then made.

25. Mrs. Willens accepted that there is a hazard but there had been a four month delay between the first and second notices and nothing had happened. Then the second notice stage was not complete and she was still not sure what was to replace the walls.

26. Mrs. Willens accepted that the garden walls had to come down, that the Applicant has a duty to repair or replace them and that she has a duty to pay 39.38% of the reasonable cost.

27. Asked by Mr. Thompson what she would like to see in place of walls, Mrs Willens said that the walls should have come down long ago and that if she had to choose she would say a properly built fence with proper foundation and interwoven fencing. The work would need to be done by contractors who knew what they were doing; not a handyman. The fence should have concrete slotted posts, concrete gravel boards and foundations. It had to be carefully thought through. The back wall faces south west and wind is a problem. The wind from the north east hits the flank wall. In the storm on Christmas Eve 2013 many fences in Sheerness had been damaged. A fence of a height of five feet or just an inch or two more was better than a six foot fence as it would not catch the wind so much. Mr. Thompson agreed with that. Mrs. Willens said that the removal of the pedestrian gate was not a problem for her provided she had access through the vehicle gates. Mr. Thompson agreed that the lessees need access to the back garden and said that the intention was to replace the vehicle gates to a similar height to the fence and to use timber from the pedestrian gate to repair those gates. He wanted the cheapest quote for a reasonable job. Mrs. Willens pointed out the difficulty of having a bolt on the inside of the vehicle gates if it could not be operated from outside. She would

like a lock on the vehicle gates and for the lessees to have keys to it but Mr. Thompson is concerned about ongoing maintenance of a lock.

28. Mr. Thompson's evidence was that the need for the works started when the gates were apparently damaged by a car in December 2012 and an insurance claim was made for the gates. When the insurer met the contractor on site, the contractor said the wall was defective. The Applicant does not have any public liability insurance and Mr. Thompson does not know when such insurance was last in place. When he was advised that the wall work was needed he tried to get the insurers to pay but they refused. It had taken time, until March 2013, to obtain the two quotes for the rebuilding of the walls and that would have been done if the insurers had paid. He stated that he did not know the walls were defective until May 2013 but in March 2013 he had estimates for removing and rebuilding the walls. His explanation for that was that he asked for a quote for the gates and the contractor gave a quote for the gates and walls. It was a mistake by the contractor. In March 2013 Mr. Thompson had had a look at the walls but did not think they were defective but if the insurers were going to pay then there was no problem and it was to the advantage of all the lessees.

29. Mrs. Willens considered that now that all parties know the position the consultation process should start again based on more than one verbal estimate.

30. During the course of the hearing it had become clear that there was a certain amount of common ground between the parties and that it would assist the parties if that common ground were clarified and embodied in a short document signed by those present. In that way the matter would move forward and would reduce the extent of further disputes in the future. The Tribunal invited Mr. Thompson to draw up a list of the matters which he understood were agreed and invited Mrs. Willens to inspect that document and make any amendments to it to reflect her understanding of the matters agreed. After some discussion as to the contents of the document, those present agreed its contents and signed it.

31. A copy of that document dated 9th January 2014 and signed by Mrs. Willens and Mr. and Mrs. Thompson on behalf of themselves, the Applicant and Featurekey Properties Ltd is annexed to this decision and reads as follows:

"It is agreed between the parties Mrs. C M. Willens, Featurekey Properties Ltd, J F & D P Thompson, Influential Consultants Ltd: That the existing garden walls to 301 High St Sheerness are to be demolished and replaced by timber interwoven fence panels, concrete gravel boards and slotted concrete posts to a height of approx 5'. The single gate is to be removed and replaced by fencing and double car gates are to be properly fitted to a height similar to the fence, with access to all lessees from the Maple Street side."

32. Mr. Thompson was concerned about raising the money to carry out the works and Mrs. Willens stated that if he wanted to use the money the

Applicant has in reserve then that can be done once the parties have had estimates.

33. Mrs. Willens said she would try to get an estimate and wanted the opportunity to do so. The Tribunal pointed out that she could do so but that the consultation process required only that she provide the name of a contractor from whom the Applicant should obtain an estimate. She accepted that if the first notice had been in the terms of the document signed by the parties at the hearing she would have gone along with it but would have wanted to know when the works would be done and about the gates and would still have wanted to nominate a contractor to be asked for an estimate.

34. Mrs. Willens had mentioned in representations the possibility of an application for an order under Section 20C of the 1985 Act. Mr. Thompson said there were no costs but he would try to get back through the service charges the application fee and hearing fee. Mrs. Willens stated that she did not want to make an application for a Section 20C order at the hearing but would prefer to put it in writing separately.

Reasons

35. The Tribunal was satisfied that the Section 20 consultation procedure had not been carried out correctly and that Mrs. Willens had been prejudiced by it.

36. The matter had not been thought through. On Mr. Thompson's evidence it began as an insurance claim and he asked contractors for an estimate in respect of the gates but he received two estimates for the walls with no mention of the gates. The first notice described the works as the demolition and removal of the defective rear garden wall and gates and their replacement as necessary and in the light of the contents of a letter dated 21st May 2013 which was attached. That letter included that estimates had been obtained for the work required to reinstate the walls and that the cost would be approximately £5,000. Also that to make cost savings the Applicant was considering reducing the replacement wall height or replacement of the walls by fencing. It was stated that it was the Applicant's considered opinion that the best way forward was for the defective walling to be removed as soon as possible and to be replaced by approximately four foot high brickwork to modern constructional standards, that the single gate be removed and replaced by walling and that the double gateway be retained with suitably reduced height gates. That this would minimise costs and reduce maintenance and Mrs. Willens was asked for her input.

37. The second notice dated 25th September 2013 was served and enclosed with it, in addition to the two earlier estimates, were two further estimates. The one from Hardings was "For the removal and disposal of garden gate and walls and the fitting of new fence panels with posts and gravel boards at 301 High street sheerness." at a cost of £3,400. Apparently a gate was to be disposed of and the type of fence panels to be used was not specified. The estimate from Commercial Electrical Services Ltd. was to "... Remove existing rear garden walls, gates and dispose of. Set concrete posts in ground. Fit

concrete gravel boards and fence panels.” at a cost of £3,096. Apparently all gates were to be disposed of and the inference was that concrete fence panels would be used. Certainly, Mr. Thompson who had requested the estimate understood that concrete fence panels were to be used until there was later discussion with the contractor as set out in the letter dated 24th October 2013.

38. The works to be carried out have changed from when estimates were first obtained in March 2013 and there are no two estimates from which to make a like for like comparison. Indeed, there is not one written estimate which deals with all the works intended to be carried out. As a result, Mrs. Willens has been prejudiced by the Applicant’s failure to properly carry out the consultation procedure.

39. The consultation process must be properly commenced and completed and the time for the lessees’ observations must remain as provided by statute and regulations. However, now that the parties have agreed almost all the detail of the works and have agreed that the walls represent a hazard, the Tribunal hopes that although Mrs. Willens must be given the full time to respond, she will be able to respond more quickly and enable the works to be carried out without further delay.

40. The Tribunal notes Mrs. Willens’ statement that if Mr. Thompson wants to finance the cost of the works by using the money the Applicant has in reserve then that can be done once the parties have had estimates.

Appeals

41. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

42. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

43. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

44. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Judge R. Norman (Chairman)

It is agreed between the parties Mrs C.M. Willness,
Fentuskey Properties Ltd, JF & D Thompson, Influential
Consultants Ltd: That the existing garden walls &
~~gates~~ to 301 High St Sheerness are to be ~~demolished~~
^{removed} ~~demolished~~
and replaced by timber uterover fence panels,
concrete gravel beds and studded concrete posts to a
height of approx 5'. The single gate is to be removed
& replaced by fencing & ~~the~~ double car gates ^{are} to
~~be replaced~~ ^{properly fitted} to a height similar to the
fence, with access to all ~~residents~~ ^{leaves} from
the Maple Street side.



Catherine M. Willness
09 Jan. 2014

on behalf of
Fentuskey Properties Ltd
JF & D Thompson
Influential Consultants Ltd

